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24.203 Policy.

(a) The Act specifies, among other things, how agencies shall make their records available upon public request, imposes strict time standards for agency responses, and exempts certain records from public disclosure. Each agency's implementation of these requirements is located in its respective title of the Code of Federal Regulations and referenced in subpart 24.2 of its implementing acquisition regulations.

(b) Contracting officers may receive requests for records that may be exempted from mandatory public disclosure. The exemptions most often applicable are those relating to classified information, to trade secrets and confidential commercial or financial information, to interagency or intra-agency memoranda, or to personal and medical information pertaining to an individual. Other exemptions include agency personnel practices, and law enforcement. Since these requests often involve complex issues requiring an in-depth knowledge of a large and increasing body of court rulings and policy guidance, contracting officers are cautioned to comply with the implementing regulations of their agency and to obtain necessary guidance from the agency officials having Freedom of Information Act responsibility. If additional assistance is needed, authorized agency officials may contact the Department of Justice, Office of Information and Privacy. A Freedom of Information Act guide and other resources are available at the Department of Justice website under FOIA reference materials: <http://www.usdoj.gov/oip>.

[48 FR 42277, Sept. 19, 1983, as amended at 51 FR 31426, Sept. 3, 1986. Redesignated at 62 FR 257, Jan. 2, 1997; 74 FR 2733, Jan. 15, 2009]

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AUTHORITY: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

SOURCE: 64 FR 72419, Dec. 27, 1999, unless otherwise noted.

25.000 Scope of part.

(a) This part provides policies and procedures for—

(1) Acquisition of foreign supplies, services, and construction materials; and

(2) Contracts performed outside the United States.

(b) It implements the Buy American Act, trade agreements, and other laws and regulations.

[73 FR 10957, Feb. 28, 2008]

25.001 General.

(a) The Buy American Act—

(1) Restricts the purchase of supplies, that are not domestic end products, for use within the United States. A foreign end product may be purchased if the contracting officer determines that the price of the lowest domestic offer is unreasonable or if another exception applies (see Subpart 25.1); and

(2) Requires, with some exceptions, the use of only domestic construction materials in contracts for construction in the United States (see Subpart 25.2).

(b) The restrictions in the Buy American Act are not applicable in acquisitions subject to certain trade agreements (see Subpart 25.4). In these acquisitions, end products and construction materials from certain countries receive nondiscriminatory treatment in evaluation with domestic offers. Generally, the dollar value of the acquisition determines which of the trade agreements applies. Exceptions to the applicability of the trade agreements are described in Subpart 25.4.

(c) The test to determine the country of origin for an end product under the Buy American Act (see the various country “end product” definitions in 25.003) is different from the test to determine the country of origin for an end product under the trade agreements, or the criteria for the report on end products manufactured outside the United States (see 25.004).

(1) The Buy American Act uses a two-part test to define a “domestic end product” or “domestic construction material” (manufactured in the United States and a formula based on cost of domestic components). The component test has been waived for acquisition of commercially available off-the-shelf items.

(2) Under the trade agreements, the test to determine country of origin is “substantial transformation” (*i.e.*, transforming an article into a new and different article of commerce, with a name, character, or use distinct from the original article).

(3) For the reporting requirement at 25.004, the only criterion is whether the place of manufacture of an end product is in the United States or outside the United States, without regard to the origin of the components.

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(4) When using funds appropriated under the American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5), the definition of “domestic manufactured construction material” requires manufacture in the United States but

does not include a requirement with regard to the origin of the components.

[64 FR 72419, Dec. 27, 1999, as amended at 67 FR 21535, Apr. 30, 2002; 71 FR 20306, Apr. 19, 2006; 71 FR 57377, Sept. 28, 2006; 74 FR 14626, Mar. 31, 2009]

25.002 Applicability of subparts.

The following table shows the applicability of the subparts. Subpart 25.5 provides comprehensive procedures for offer evaluation and examples.

	Subpart	Supplies for use		Construction		Services performed	
		Inside U.S.	Out-side U.S.	Inside U.S.	Out-side U.S.	Inside U.S.	Out-side U.S.
25.1	Buy American Act—Supplies	X					
25.2	Buy American Act—Construction Materials			X			
25.3	Contracts Performed Outside the United States		X		X		X
25.4	Trade Agreements	X	X	X	X	X	X
25.5	Evaluating Foreign Offers—Supply Contracts	X	X				
25.6	American Recovery and Reinvestment Act—Buy American Act—Construction Materials.			X			
25.7	Prohibited Sources	X	X	X	X	X	X
25.8	Other International Agreements and Coordination	X	X		X		X
25.9	Customs and Duties	X					
25.10	Additional Foreign Acquisition Regulations	X	X	X	X	X	X
25.11	Solicitation Provisions and Contract Clauses	X	X	X	X	X	X

[64 FR 72419, Dec. 27, 1999, as amended at 67 FR 21535, Apr. 30, 2002; 71 FR 20306, Apr. 19, 2006; 73 FR 10957, Feb. 28, 2008; 74 FR 14626, Mar. 31, 2009]

25.003 Definitions.

As used in this part—

Canadian end product means an article that—

(1) Is wholly the growth, product, or manufacture of Canada; or

(2) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in Canada into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product includes services (except transportation services) incidental to the article, provided that the value of those incidental services does not exceed that of the article itself.

Caribbean Basin country means any of the following countries: Antigua and Barbuda, Aruba, Bahamas, Barbados, Belize, British Virgin Islands, Dominica, Grenada, Guyana, Haiti, Jamaica,

Montserrat, Netherlands Antilles, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, or Trinidad and Tobago.

Caribbean Basin country end product—

(1) Means an article that—

(i)(A) Is wholly the growth, product, or manufacture of a Caribbean Basin country; or

(B) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in a Caribbean Basin country into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed; and

(ii) Is not excluded from duty-free treatment for Caribbean countries under 19 U.S.C. 2703(b).

(A) For this reason, the following articles are not Caribbean Basin country end products:

(1) Tuna, prepared or preserved in any manner in airtight containers.

(2) Petroleum, or any product derived from petroleum.

(3) Watches and watch parts (including cases, bracelets, and straps) of whatever type including, but not limited to, mechanical, quartz digital, or quartz analog, if such watches or watch parts contain any material that is the product of any country to which the Harmonized Tariff Schedule of the United States (HTSUS) column 2 rates of duty apply (*i.e.*, Afghanistan, Cuba, Laos, North Korea, and Vietnam).

(4) Certain of the following: textiles and apparel articles; footwear, handbags, luggage, flat goods, work gloves, and leather wearing apparel; or handloomed, handmade, and folklore articles.

(B) Access to the HTSUS to determine duty-free status of articles of the types listed in paragraph (1)(ii)(A)(4) of this definition is available via the Internet at <http://www.usitc.gov/tata/hts/>. In particular, see the following:

(1) General Note 3(c), Products Eligible for Special Tariff treatment.

(2) General Note 17, Products of Countries Designated as Beneficiary Countries under the United States-Caribbean Basin Trade Partnership Act of 2000.

(3) Section XXII, Chapter 98, Subchapter II, Articles Exported and Returned, Advanced or Improved Abroad, U.S. Note 7(b).

(4) Section XXII, Chapter 98, Subchapter XX, Goods Eligible for Special Tariff Benefits under the United States-Caribbean Basin Trade Partnership Act; and

(2) Refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the acquisition, includes services (except transportation services) incidental to the article, provided that the value of those incidental services does not exceed that of the article itself.

Civil aircraft and related articles means—

(1) All aircraft other than aircraft to be purchased for use by the Department of Defense or the U.S. Coast Guard;

(2) The engines (and parts and components for incorporation into the engines) of these aircraft;

(3) Any other parts, components, and subassemblies for incorporation into the aircraft; and

(4) Any ground flight simulators, and parts and components of these simulators, for use with respect to the aircraft, whether to be used as original or replacement equipment in the manufacture, repair, maintenance, rebuilding, modification, or conversion of the aircraft and without regard to whether the aircraft or articles receive duty-free treatment under section 601(a)(2) of the Trade Agreements Act.

Component means an article, material, or supply incorporated directly into an end product or construction material.

Construction material means an article, material, or supply brought to the construction site by a contractor or subcontractor for incorporation into the building or work. The term also includes an item brought to the site preassembled from articles, materials, or supplies. However, emergency life safety systems, such as emergency lighting, fire alarm, and audio evacuation systems, that are discrete systems incorporated into a public building or work and that are produced as complete systems, are evaluated as a single and distinct construction material regardless of when or how the individual parts or components of those systems are delivered to the construction site. Materials purchased directly by the Government are supplies, not construction material.

Cost of components means—

(1) For components purchased by the contractor, the acquisition cost, including transportation costs to the place of incorporation into the end product or construction material (whether or not such costs are paid to a domestic firm), and any applicable duty (whether or not a duty-free entry certificate is issued); or

(2) For components manufactured by the contractor, all costs associated with the manufacture of the component, including transportation costs as described in paragraph (1) of this definition, plus allocable overhead costs, but excluding profit. Cost of components does not include any costs associated with the manufacture of the end product.

Designated country means any of the following countries:

(1) A World Trade Organization Government Procurement Agreement country (Aruba, Austria, Belgium, Bulgaria, Canada, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hong Kong, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea (Republic of), Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Romania, Singapore, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Taiwan (known in the World Trade Organization as “the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu” (Chinese Taipei)) or United Kingdom);

(2) A Free Trade Agreement country (Australia, Bahrain, Canada, Chile, Costa Rica, Dominican, El Salvador, Guatemala, Honduras, Mexico, Morocco, Nicaragua, Oman, Peru, or Singapore);

(3) A least developed country (Afghanistan, Angola, Bangladesh, Benin, Bhutan, Burkina Faso, Burundi, Cambodia, Central African Republic, Chad, Comoros, Democratic Republic of Congo, Djibouti, East Timor, Equatorial Guinea, Eritrea, Ethiopia, Gambia, Guinea, Guinea-Bissau, Haiti, Kiribati, Laos, Lesotho, Liberia, Madagascar, Malawi, Maldives, Mali, Mauritania, Mozambique, Nepal, Niger, Rwanda, Samoa, Sao Tome and Principe, Senegal, Sierra Leone, Solomon Islands, Somalia, Tanzania, Togo, Tuvalu, Uganda, Vanuatu, Yemen, or Zambia); or

(4) A Caribbean Basin country (Antigua and Barbuda, Aruba, Bahamas, Barbados, Belize, British Virgin Islands, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, Netherlands Antilles, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, or Trinidad and Tobago).

Designated country end product means a WTO GPA country end product, an FTA country end product, a least developed country end product, or a Caribbean Basin country end product.

Domestic construction material means—

(1) An unmanufactured construction material mined or produced in the United States;

(2) A construction material manufactured in the United States, if—

(i) The cost of its components mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. Components of foreign origin of the same class or kind for which nonavailability determinations have been made are treated as domestic; or

(ii) The construction material is a COTS item.

Domestic end product means—

(1) An unmanufactured end product mined or produced in the United States;

(2) An end product manufactured in the United States, if—

(i) The cost of its components mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. Components of foreign origin of the same class or kind as those that the agency determines are not mined, produced, or manufactured in sufficient and reasonably available commercial quantities of a satisfactory quality are treated as domestic. Scrap generated, collected, and prepared for processing in the United States is considered domestic; or

(ii) The end product is a COTS item.

Domestic offer means an offer of a domestic end product. When the solicitation specifies that award will be made on a group of line items, a domestic offer means an offer where the proposed price of the domestic end products exceeds 50 percent of the total proposed price of the group.

Eligible offer means an offer of an eligible product. When the solicitation specifies that award will be made on a group of line items, an eligible offer means a foreign offer where the combined proposed price of the eligible products and the domestic end products exceeds 50 percent of the total proposed price of the group.

Eligible product means a foreign end product, construction material, or service that, due to applicability of a trade agreement to a particular acquisition, is not subject to discriminatory treatment.

End product means those articles, materials, and supplies to be acquired for public use.

Foreign construction material means a construction material other than a domestic construction material.

Foreign contractor means a contractor or subcontractor organized or existing under the laws of a country other than the United States.

Foreign end product means an end product other than a domestic end product.

Foreign offer means any offer other than a domestic offer.

Free Trade Agreement country means Australia, Bahrain, Canada, Chile, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Mexico, Morocco, Nicaragua, Oman, Peru, or Singapore.

Free Trade Agreement country end product means an article that—

(1) Is wholly the growth, product, or manufacture of a Free Trade Agreement (FTA) country; or

(2) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in an FTA country into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product, includes services (except transportation services) incidental to the article, provided that the value of those incidental services does not exceed that of the article itself.

Israeli end product means an article that—

(1) Is wholly the growth, product, or manufacture of Israel; or

(2) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in Israel into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed.

Least developed country means any of the following countries: Afghanistan, Angola, Bangladesh, Benin, Bhutan, Burkina Faso, Burundi, Cambodia, Central African Republic, Chad, Comoros, Democratic Republic of Congo, Djibouti, East Timor, Equatorial

Guinea, Eritrea, Ethiopia, Gambia, Guinea, Guinea-Bissau, Haiti, Kiribati, Laos, Lesotho, Liberia, Madagascar, Malawi, Maldives, Mali, Mauritania, Mozambique, Nepal, Niger, Rwanda, Samoa, Sao Tome and Principe, Senegal, Sierra Leone, Solomon Islands, Somalia, Tanzania, Togo, Tuvalu, Uganda, Vanuatu, Yemen, or Zambia.

Least developed country end product means an article that—

(1) Is wholly the growth, product, or manufacture of a least developed country; or

(2) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in a least developed country into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product, includes services (except transportation services) incidental to the article, provided that the value of those incidental services does not exceed that of the article itself.

Noneligible offer means an offer of a noneligible product.

Noneligible product means a foreign end product that is not an eligible product.

United States means the 50 States, the District of Columbia, and outlying areas.

U.S.-made end product means an article that is mined, produced, or manufactured in the United States or that is substantially transformed in the United States into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed.

World Trade Organization Government Procurement Agreement (WTO GPA) country means any of the following countries: Aruba, Austria, Belgium, Bulgaria, Canada, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hong Kong, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea (Republic of), Latvia, Liechtenstein, Lithuania, Luxembourg,

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Malta, Netherlands, Norway, Poland, Portugal, Romania, Singapore, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Taiwan, or United Kingdom.

WTO GPA country end product means an article that—

(1) Is wholly the growth, product, or manufacture of a WTO GPA country; or

(2) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in a WTO GPA country into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product includes services (except transportation services) incidental to the article, provided that the value of those incidental services does not exceed that of the article itself.

[64 FR 72419, Dec. 27, 1999]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting 25.003, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

25.004 Reporting of acquisition of end products manufactured outside the United States.

(a) In accordance with the requirements of 41 U.S.C. 10a, the head of each Federal agency must submit a report to Congress on the amount of the acquisitions made by the agency from entities that manufacture end products outside the United States in that fiscal year.

(b) This report will be partially based on information collected from offerors using solicitation provision 52.225-18, Place of Manufacture (and its commercial item equivalent in 52.212-3, Offeror Representations and Certifications—Commercial Items). For purposes of this report, the criteria established in the law is only whether the place of manufacture of an end product is in the United States or outside the United

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States, without regard to the origin of the components (see 25.001(c)).

[71 FR 57377, Sept. 28, 2006, as amended at 72 FR 46327, Aug. 17, 2007]

Subpart 25.1—Buy American Act—Supplies

25.100 Scope of subpart.

(a) This subpart implements—

(1) The Buy American Act (41 U.S.C. 10a - 10d);

(2) Executive Order 10582, December 17, 1954; and

(3) Waiver of the component test of the Buy American Act for acquisitions of commercially available off-the-shelf (COTS) items in accordance with 41 U.S.C 431.

(b) It applies to supplies acquired for use in the United States, including supplies acquired under contracts set aside for small business concerns, if—

(1) The supply contract exceeds the micro-purchase threshold; or

(2) The supply portion of a contract for services that involves the furnishing of supplies (e.g., lease) exceeds the micro-purchase threshold.

[74 2722, Jan. 15, 2009]

25.101 General.

(a) The Buy American Act restricts the purchase of supplies that are not domestic end products. For manufactured end products, the Buy American Act uses a two-part test to define a domestic end product.

(1) The article must be manufactured in the United States; and

(2) The cost of domestic components must exceed 50 percent of the cost of all the components. In accordance with 41 U.S.C. 431, this component test of the Buy American Act has been waived for acquisitions of COTS items (see 12.505(a)).

(b) The Buy American Act applies to small business set-asides. A manufactured product of a small business concern is a U.S.-made end product, but is not a domestic end product unless it meets the component test in paragraph (a)(2) of this section.

(c) Exceptions that allow the purchase of a foreign end product are listed at 25.103. The unreasonable cost exception is implemented through the

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use of an evaluation factor applied to low foreign offers that are not eligible offers. The evaluation factor is not used to provide a preference for one foreign offer over another. Evaluation procedures and examples are provided in Subpart 25.5.

[64 FR 72419, Dec. 27, 1999, as amended at 74 FR 2722, Jan. 15, 2009]

25.102 Policy.

Except as provided in 25.103, acquire only domestic end products for public use inside the United States.

25.103 Exceptions.

When one of the following exceptions applies, the contracting officer may acquire a foreign end product without regard to the restrictions of the Buy American Act:

(a) *Public interest.* The head of the agency may make a determination that domestic preference would be inconsistent with the public interest. This exception applies when an agency has an agreement with a foreign government that provides a blanket exception to the Buy American Act.

(b) *Nonavailability.* The Buy American Act does not apply with respect to articles, materials, or supplies if articles, materials, or supplies of the class or kind to be acquired, either as end items or components, are not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality.

(1) *Class determinations.* (i) A non-availability determination has been made for the articles listed in 25.104. This determination does not necessarily mean that there is no domestic source for the listed items, but that domestic sources can only meet 50 percent or less of total U.S. Government and nongovernment demand.

(ii) Before acquisition of an article on the list, the procuring agency is responsible to conduct market research appropriate to the circumstances, including seeking of domestic sources. This applies to acquisition of an article as—

(A) An end product; or

(B) A significant component (valued at more than 50 percent of the value of all the components).

(iii) The determination in paragraph (b)(1)(i) of this section does not apply if the contracting officer learns at any time before the time designated for receipt of bids in sealed bidding or final offers in negotiation that an article on the list is available domestically in sufficient and reasonably available commercial quantities of a satisfactory quality to meet the requirements of the solicitation. The contracting officer must—

(A) Ensure that the appropriate Buy American Act provision and clause are included in the solicitation (see 25.1101(a), 25.1101(b), or 25.1102);

(B) Specify in the solicitation that the article is available domestically and that offerors and contractors may not treat foreign components of the same class or kind as domestic components; and

(C) Submit a copy of supporting documentation to the appropriate council identified in 1.201-1, in accordance with agency procedures, for possible removal of the article from the list.

(2) *Individual determinations.* (i) The head of the contracting activity may make a determination that an article, material, or supply is not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities of a satisfactory quality.

(ii) If the contracting officer considers that the nonavailability of an article is likely to affect future acquisitions, the contracting officer may submit a copy of the determination and supporting documentation to the appropriate council identified in 1.201-1, in accordance with agency procedures, for possible addition to the list in 25.104.

(3) A written determination is not required if all of the following conditions are present:

(i) The acquisition was conducted through use of full and open competition.

(ii) The acquisition was synopsized in accordance with 5.201.

(iii) No offer for a domestic end product was received.

(c) *Unreasonable cost.* The contracting officer may determine that the cost of

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a domestic end product would be unreasonable, in accordance with 25.105 and Subpart 25.5.

(d) *Resale.* The contracting officer may purchase foreign end products specifically for commissary resale.

(e) *Information technology that is a commercial item.* The restriction on purchasing foreign end products does not apply to the acquisition of information technology that is a commercial item, when using fiscal year 2004 or subsequent fiscal year funds (Section 535(a) of Division F, Title V, Consolidated Appropriations Act, 2004, and similar sections in subsequent appropriations acts).

[64 FR 72419, Dec. 27, 1999, as amended at 70 FR 11742, Mar. 9, 2005; 71 FR 224, Jan. 3, 2006]

25.104 Nonavailable articles.

(a) The following articles have been determined to be nonavailable in accordance with 25.103(b)(1)(i):

Acetylene, black.
 Agar, bulk.
 Anise.
 Antimony, as metal or oxide.
 Asbestos, amosite, chrysotile, and crocidolite.
 Bamboo shoots.
 Bananas.
 Bauxite.
 Beef, corned, canned.
 Beef extract.
 Bephenium hydroxynapthoate.
 Bismuth.
 Books, trade, text, technical, or scientific; newspapers; pamphlets; magazines; periodicals; printed briefs and films; not printed in the United States and for which domestic editions are not available.
 Brazil nuts, unroasted.
 Cadmium, ores and flue dust.
 Calcium cyanamide.
 Capers.
 Cashew nuts.
 Castor beans and castor oil.
 Chalk, English.
 Chestnuts.
 Chiclé.
 Chrome ore or chromite.
 Cinchona bark.
 Cobalt, in cathodes, rondelles, or other primary ore and metal forms.
 Cocoa beans.
 Coconut and coconut meat, unsweetened, in shredded, desiccated, or similarly prepared form.
 Coffee, raw or green bean.
 Colchicine alkaloid, raw.
 Copra.
 Cork, wood or bark and waste.

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Cover glass, microscope slide.
 Crane rail (85-pound per foot).
 Cryolite, natural.
 Dammar gum.
 Diamonds, industrial, stones and abrasives.
 Emetine, bulk.
 Ergot, crude.
 Erythrityl tetranitrate.
 Fair linen, altar.
 Fibers of the following types: abaca, abace, agave, coir, flax, jute, jute burlaps, palmyra, and sisal.
 Goat hair canvas.
 Goat and kidskins.
 Grapefruit sections, canned.
 Graphite, natural, crystalline, crucible grade.
 Hand file sets (Swiss pattern).
 Handsewing needles.
 Hemp yarn.
 Hog bristles for brushes.
 Hyoscine, bulk.
 Ipecac, root.
 Iodine, crude.
 Kaurigum.
 Lac.
 Leather, sheepskin, hair type.
 Lavender oil.
 Manganese.
 Menthol, natural bulk.
 Mica.
 Microprocessor chips (brought onto a Government construction site as separate units for incorporation into building systems during construction or repair and alteration of real property).
 Nickel, primary, in ingots, pigs, shots, cathodes, or similar forms; nickel oxide and nickel salts.
 Modacrylic fur ruff.
 Nitroguanidine (also known as picrite).
 Nux vomica, crude.
 Oiticica oil.
 Olive oil.
 Olives (green), pitted or unpitted, or stuffed, in bulk.
 Opium, crude.
 Oranges, mandarin, canned.
 Petroleum, crude oil, unfinished oils, and finished products.
 Pine needle oil.
 Platinum and related group metals, refined, as sponge, powder, ingots, or cast bars.
 Pyrethrum flowers.
 Quartz crystals.
 Quebracho.
 Quinidine.
 Quinine.
 Rabbit fur felt.
 Radium salts, source and special nuclear materials.
 Rosettes.
 Rubber, crude and latex.
 Rutile.
 Santonin, crude.
 Secretin.
 Shellac.

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Silk, raw and unmanufactured.
Spare and replacement parts for equipment of foreign manufacture, and for which domestic parts are not available.
Spices and herbs, in bulk.
Sugars, raw.
Swords and scabbards.
Talc, block, steatite.
Tantalum.
Tapioca flour and cassava.
Tartar, crude; tartaric acid and cream of tartar in bulk.
Tea in bulk.
Thread, metallic (gold).
Thyme oil.
Tin in bars, blocks, and pigs.
Triprolidine hydrochloride.
Tungsten.
Vanilla beans.
Venom, cobra.
Water chestnuts.
Wax, carnauba.
Wire glass.
Woods; logs, veneer, and lumber of the following species: Alaskan yellow cedar, angelique, balsa, ekki, greenheart, lignum vitae, mahogany, and teak.
Yarn, 50 Denier rayon.

(b) This list will be published in the FEDERAL REGISTER for public comment no less frequently than once every five years. Unsolicited recommendations for deletions from this list may be submitted at any time and should provide sufficient data and rationale to permit evaluation (see 1.502).

[64 FR 72419, Dec. 27, 1999, as amended at 69 FR 34241, June 18, 2004; 70 FR 11743, Mar. 9, 2005]

25.105 Determining reasonableness of cost.

(a) The contracting officer—

(1) Must use the evaluation factors in paragraph (b) of this section unless the head of the agency makes a written determination that the use of higher factors is more appropriate. If the determination applies to all agency acquisitions, the agency evaluation factors must be published in agency regulations; and

(2) Must not apply evaluation factors to offers of eligible products if the acquisition is subject to a trade agreement under Subpart 25.4.

(b) If there is a domestic offer that is not the low offer, and the restrictions of the Buy American Act apply to the low offer, the contracting officer must determine the reasonableness of the cost of the domestic offer by adding to

the price of the low offer, inclusive of duty—

(1) 6 percent, if the lowest domestic offer is from a large business concern; or

(2) 12 percent, if the lowest domestic offer is from a small business concern. The contracting officer must use this factor, or another factor established in agency regulations, in small business set-asides if the low offer is from a small business concern offering the product of a small business concern that is not a domestic end product (see Subpart 19.5).

(c) The price of the domestic offer is reasonable if it does not exceed the evaluated price of the low offer after addition of the appropriate evaluation factor in accordance with paragraph (a) or (b) of this section. (See evaluation procedures at Subpart 25.5.)

Subpart 25.2—Buy American Act—Construction Materials

25.200 Scope of subpart.

(a) This subpart implements—

(1) The Buy American Act (41 U.S.C. 10a - 10d);

(2) Executive Order 10582, December 17, 1954; and

(3) Waiver of the component test of the Buy American Act for acquisitions of commercially available off-the-shelf (COTS) items in accordance with 41 U.S.C. 431.

(b) It applies to contracts for the construction, alteration, or repair of any public building or public work in the United States.

(c) When using funds appropriated or otherwise provided by the American Recovery and Reinvestment Act of 2009 (Pub. L. 111-5) (Recovery Act) for construction, see Subpart 25.6.

[74 FR 2722, Jan. 15, 2009, as amended at 74 FR 22810, May 14, 2009]

25.201 Policy.

Except as provided in 25.202, use only domestic construction materials in construction contracts performed in the United States.

25.202 Exceptions.

(a) When one of the following exceptions applies, the contracting officer

may acquire foreign construction materials without regard to the restrictions of the Buy American Act:

(1) *Impracticable or inconsistent with public interest.* The head of the agency may determine that application of the restrictions of the Buy American Act to a particular construction material would be impracticable or would be inconsistent with the public interest. The public interest exception applies when an agency has an agreement with a foreign government that provides a blanket exception to the Buy American Act.

(2) *Nonavailability.* The head of the contracting activity may determine that a particular construction material is not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities of a satisfactory quality. The determinations of nonavailability of the articles listed at 25.104(a) and the procedures at 25.103(b)(1) also apply if any of those articles are acquired as construction materials.

(3) *Unreasonable cost.* The contracting officer concludes that the cost of domestic construction material is unreasonable in accordance with 25.204.

(b) *Determination and findings.* When a determination is made for any of the reasons stated in this section that certain foreign construction materials may be used, the contracting officer must list the excepted materials in the contract. The agency must make the findings justifying the exception available for public inspection.

(c) *Acquisitions under trade agreements.* For construction contracts with an estimated acquisition value of \$7,443,000 or more, see Subpart 25.4.

[64 FR 72419, Dec. 27, 1999, as amended at 65 FR 36026, June 6, 2000; 67 FR 56123, Aug. 30, 2002; 69 FR 1053, Jan. 7, 2004; 70 FR 11743, Mar. 9, 2005; 71 FR 865, Jan. 5, 2006; 73 FR 10963, Feb. 28, 2008]

25.203 Preaward determinations.

(a) For any acquisition, an offeror may request from the contracting officer a determination concerning the inapplicability of the Buy American Act for specifically identified construction materials. The time for submitting the request is specified in the solicitation in paragraph (b) of either 52.225–10 or

52.225–12, whichever applies. The information and supporting data that must be included in the request are also specified in the solicitation in paragraphs (c) and (d) of either 52.225–9 or 52.225–11, whichever applies.

(b) Before award, the contracting officer must evaluate all requests based on the information provided and may supplement this information with other readily available information.

25.204 Evaluating offers of foreign construction material.

(a) Offerors proposing to use foreign construction material other than that listed by the Government in the applicable clause at 52.225–9, paragraph (b)(2), or 52.225–11, paragraph (b)(3), or covered by the WTO GPA or a Free Trade Agreement (paragraph (b)(2) of 52.225–11), must provide the information required by paragraphs (c) and (d) of the respective clauses.

(b) Unless the head of the agency specifies a higher percentage, the contracting officer must add to the offered price 6 percent of the cost of any foreign construction material proposed for exception from the requirements of the Buy American Act based on the unreasonable cost of domestic construction materials. In the case of a tie, the contracting officer must give preference to an offer that does not include foreign construction material excepted at the request of the offeror on the basis of unreasonable cost.

(c) Offerors also may submit alternate offers based on use of equivalent domestic construction material to avoid possible rejection of the entire offer if the Government determines that an exception permitting use of a particular foreign construction material does not apply.

(d) If the contracting officer awards a contract to an offeror that proposed foreign construction material not listed in the applicable clause in the solicitation (paragraph (b)(2) of 52.225–9, or paragraph (b)(3) of 52.225–11), the contracting officer must add the excepted materials to the list in the contract clause.

[64 FR 72419, Dec. 27, 1999, as amended at 69 FR 1053, Jan. 7, 2004; 69 FR 77873, Dec. 28, 2004]

25.205 Postaward determinations.

(a) If a contractor requests a determination regarding the inapplicability of the Buy American Act after contract award, the contractor must explain why it could not request the determination before contract award or why the need for such determination otherwise was not reasonably foreseeable. If the contracting officer concludes that the contractor should have made the request before contract award, the contracting officer may deny the request.

(b) The contracting officer must base evaluation of any request for a determination regarding the inapplicability of the Buy American Act made after contract award on information required by paragraphs (c) and (d) of the applicable clause at 52.225-9 or 52.225-11 and/or other readily available information.

(c) If a determination, under 25.202(a), is made after contract award that an exception to the Buy American Act applies, the contracting officer must negotiate adequate consideration and modify the contract to allow use of the foreign construction material. When the basis for the exception is the unreasonable price of a domestic construction material, adequate consideration is at least the differential established in 25.202(a) or in accordance with agency procedures.

25.206 Noncompliance.

The contracting officer must—

(a) Review allegations of Buy American Act violations;

(b) Unless fraud is suspected, notify the contractor of the apparent unauthorized use of foreign construction material and request a reply, to include proposed corrective action; and

(c) If the review reveals that a contractor or subcontractor has used foreign construction material without authorization, take appropriate action, including one or more of the following:

(1) Process a determination concerning the inapplicability of the Buy American Act in accordance with 25.205.

(2) Consider requiring the removal and replacement of the unauthorized foreign construction material.

(3) If removal and replacement of foreign construction material incor-

porated in a building or work would be impracticable, cause undue delay, or otherwise be detrimental to the interests of the Government, the contracting officer may determine in writing that the foreign construction material need not be removed and replaced. A determination to retain foreign construction material does not constitute a determination that an exception to the Buy American Act applies, and this should be stated in the determination. Further, a determination to retain foreign construction material does not affect the Government's right to suspend or debar a contractor, subcontractor, or supplier for violation of the Buy American Act, or to exercise other contractual rights and remedies, such as reducing the contract price or terminating the contract for default.

(4) If the noncompliance is sufficiently serious, consider exercising appropriate contractual remedies, such as terminating the contract for default. Also consider preparing and forwarding a report to the agency suspending or debarring official in accordance with Subpart 9.4. If the noncompliance appears to be fraudulent, refer the matter to other appropriate agency officials, such as the officer responsible for criminal investigation.

Subpart 25.3—Contracts Performed Outside the United States

SOURCE: 73 FR 10957, Feb. 28, 2008, unless otherwise noted.

25.301 Contractor personnel in a designated operational area or supporting a diplomatic or consular mission outside the United States.**25.301-1 Scope.**

(a) This section applies to contracts requiring contractor personnel to perform outside the United States—

(1) In a designated operational area during—

(i) Contingency operations;

(ii) Humanitarian or peacekeeping operations; or

(iii) Other military operations or military exercises, when designated by the combatant commander; or

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(2) When supporting a diplomatic or consular mission—

(i) That has been designated by the Department of State as a danger pay post (see http://aoprals.state.gov/Web920/danger_pay_all.asp); or

(ii) That the contracting officer determines is a post at which application of the clause at FAR 52.225-19, Contractor Personnel in a Designated Operational Area or Supporting a Diplomatic or Consular Mission outside the United States, is appropriate.

(b) Any of the types of operations listed in paragraph (a)(1) of this section may include stability operations such as—

(1) Establishment or maintenance of a safe and secure environment; or

(2) Provision of emergency infrastructure reconstruction, humanitarian relief, or essential governmental services (until feasible to transition to local government).

(c) This section does not apply to personal services contracts (see FAR 37.104), unless specified otherwise in agency procedures.

25.301-2 Government support.

(a) Generally, contractors are responsible for providing their own logistical and security support, including logistical and security support for their employees. The agency shall provide logistical or security support only when the appropriate agency official, in accordance with agency guidance, determines that—

(1) Such Government support is available and is needed to ensure continuation of essential contractor services; and

(2) The contractor cannot obtain adequate support from other sources at a reasonable cost.

(b) The contracting officer shall specify in the contract, and in the solicitation if possible, the exact support to be provided, and whether this support is provided on a reimbursable basis, citing the authority for the reimbursement.

25.301-3 Weapons.

The contracting officer shall follow agency procedures and the weapons policy established by the combatant commander or the chief of mission

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when authorizing contractor personnel to carry weapons (see paragraph (i) of the clause at 52.225-19, Contractor Personnel in a Designated Operational Area or Supporting a Diplomatic or Consular Mission outside the United States).

25.301-4 Contract clause.

Insert the clause at 52.225-19, Contractor Personnel in a Designated Operational Area or Supporting a Diplomatic or Consular Mission outside the United States, in solicitations and contracts, other than personal service contracts with individuals, that will require contractor personnel to perform outside the United States—

(a) In a designated operational area during—

(1) Contingency operations;

(2) Humanitarian or peacekeeping operations; or

(3) Other military operations or military exercises, when designated by the combatant commander; or

(b) When supporting a diplomatic or consular mission—

(1) That has been designated by the Department of State as a danger pay post (see http://aoprals.state.gov/Web920/danger_pay_all.asp); or

(2) That the contracting officer determines is a post at which application of the clause FAR 52.225-19, Contractor Personnel in a Designated Operational Area or Supporting a Diplomatic or Consular Mission outside the United States, is appropriate.

Subpart 25.4—Trade Agreements

25.400 Scope of subpart.

(a) This subpart provides policies and procedures applicable to acquisitions that are covered by—

(1) The World Trade Organization Government Procurement Agreement (WTO GPA), as approved by Congress in the Uruguay Round Agreements Act (Pub. L. 103-465);

(2) Free Trade Agreements (FTA), consisting of—

(i) NAFTA (the North American Free Trade Agreement, as approved by Congress in the North American Free Trade Agreement Implementation Act of 1993 (19 U.S.C. 3301 note));

(ii) Chile FTA (the United States-Chile Free Trade Agreement, as approved by Congress in the United States-Chile Free Trade Agreement Implementation Act (Pub. L. 108-77));

(iii) Singapore FTA (the United States-Singapore Free Trade Agreement, as approved by Congress in the United States-Singapore Free Trade Agreement Implementation Act (Pub. L. 108-78) (19 U.S.C. 3805 note));

(iv) Australia FTA (the United States-Australia Free Trade Agreement, as approved by Congress in the United States-Australia Free Trade Agreement Implementation Act (Pub. L. 108-286) (19 U.S.C. 3805 note));

(v) Morocco FTA (The United States-Morocco Free Trade Agreement, as approved by Congress in the United States-Morocco Free Trade Agreement Implementation Act (Pub. L. 108-302) (19 U.S.C. 3805 note));

(vi) CAFTA-DR (The Dominican Republic-Central America-United States Free Trade Agreement, as approved by Congress in the Dominican Republic-Central America-United States Free Trade Agreement Implementation Act (Pub. L. 109-53) (19 U.S.C. 4001 note));

(vii) Bahrain FTA (the United States-Bahrain Free Trade Agreement, as approved by Congress in the United States-Bahrain Free Trade Agreement Implementation Act (Pub. L. 109-169) (19 U.S.C. 3805 note));

(viii) Oman FTA (the United States-Oman Free Trade Agreement, as approved by Congress in the United States-Oman Free Trade Agreement Implementation Act (Pub. L. 109-283) (19 U.S.C. 3805 note)); and

(ix) Peru FTA (the United States-Peru Trade Promotion Agreement, as approved by Congress in the United States-Peru Trade Promotion Agreement Implementation Act (Pub. L. 110-138) (19 U.S.C. 3805 note));

(3) The least developed country designation made by the U.S. Trade Representative, pursuant to the Trade Agreements Act (19 U.S.C. 2511(b)(4)), in acquisitions covered by the WTO GPA;

(4) The Caribbean Basin Trade Initiative (CBTI) (determination of the U.S. Trade Representative that end products or construction material granted duty-free entry from countries des-

ignated as beneficiaries under the Caribbean Basin Economic Recovery Act (19 U.S.C. 2701, *et seq.*), with the exception of Panama, must be treated as eligible products in acquisitions covered by the WTO GPA;

(5) The Israeli Trade Act (the U.S.-Israel Free Trade Area Agreement, as approved by Congress in the United States-Israel Free Trade Area Implementation Act of 1985 (19 U.S.C. 2112 note)); or

(6) The Agreement on Trade in Civil Aircraft (U.S. Trade Representative waiver of the Buy American Act for signatories of the Agreement on Trade in Civil Aircraft, as implemented in the Trade Agreements Act of 1979 (19 U.S.C. 2513)).

(b) For application of the trade agreements that are unique to individual agencies, see agency regulations.

[69 FR 77873, Dec. 28, 2004, as amended at 71 FR 219, 2006; 71 FR 20307, Apr. 19, 2006; 71 FR 36937, June 28, 2006; 71 FR 67777, Nov. 22, 2006; 74 FR 28428, June 15, 2009]

25.401 Exceptions.

(a) This subpart does not apply to—

(1) Acquisitions set aside for small businesses;

(2) Acquisitions of arms, ammunition, or war materials, or purchases indispensable for national security or for national defense purposes;

(3) Acquisitions of end products for resale;

(4) Acquisitions from Federal Prison Industries, Inc., under Subpart 8.6, and acquisitions under Subpart 8.7, Acquisition from Nonprofit Agencies Employing People Who Are Blind or Severely Disabled; and

(5) Other acquisitions not using full and open competition, if authorized by Subpart 6.2 or 6.3, when the limitation of competition would preclude use of the procedures of this subpart; or sole source acquisitions justified in accordance with 13.501(a).

(b) In the World Trade Organization Government Procurement Agreement (WTO GPA) and each FTA, there is a U.S. schedule that lists services that are excluded from that agreement in acquisitions by the United States. Acquisitions of the following services are excluded from coverage by the U.S.

schedule of the WTO GPA or an FTA as indicated in this table:

The service (Federal Service Codes from the Federal Procurement Data System Product/Service Code Manual are indicated in parentheses for some services.)		WTO GPA	Bahrain FTA, CAFTA–DR, Chile FTA, NAFTA, Oman FTA and Peru FTA	Singapore FTA	Australia and Morocco FTA
(1)	All services purchased in support of military services overseas..	X	X	X	X
(2)	(i) Automatic data processing (ADP) telecommunications and transmission services (D304), except enhanced (<i>i.e.</i> , value-added) telecommunications services..	X	X	.....	.....
	(ii) ADP teleprocessing and timesharing services (D305), telecommunications network management services (D316), automated news services, data services or other information services (D317), and other ADP and telecommunications services (D399).	X	X	.....	.....
	(iii) Basic telecommunications network services (<i>i.e.</i> , voice telephone services, packet-switched data transmission services, circuit-switched data transmission services, telex services, telegraph services, facsimile services, and private leased circuit services, but not information services, as defined in 47 U.S.C. 153(20))..	*	*	X	X
(3)	Dredging	X	X	X	X
(4)	(i) Operation and management contracts of certain Government or privately owned facilities used for Government purposes, including Federally Funded Research and Development Centers.	X	.....	X	.....
	(ii) Operation of all Department of Defense, Department of Energy, or the National Aeronautics and Space Administration facilities; and all Government-owned research and development facilities or Government-owned environmental laboratories.	* *	X	* *	X
(5)	Research and development	X	X	X	X
(6)	Transportation services (including launching services, but not including travel agent services—V503).	X	X	X	X
(7)	Utility services	X	X	X	X
(8)	Maintenance, repair, modification, rebuilding and installation of equipment related to ships (J019).	.....	X	.....	X
(9)	Nonnuclear ship repair (J998) .....	.....	X	.....	X

*NOTE 1. Acquisitions of the services listed at (2)(iii) of this table are a subset of the excluded services at (2)(i) and (ii), and are therefore not covered under the WTO GPA.

**NOTE 2. Acquisitions of the services listed at (4)(ii) of this table are a subset of the excluded services at (4)(i), and are therefore not covered under the WTO GPA.

[69 FR 1054, Jan. 7, 2004, as amended at 69 FR 77874, Dec. 28, 2004; 70 FR 18958, Apr. 11, 2005; 71 FR 219, Jan. 3, 2006; 71 FR 20307, Apr. 19, 2006; 71 FR 36937, June 28, 2006; 71 FR 67777, Nov. 22, 2006; 74 FR 28428, June 15, 2009]

25.402 General.

(a)(1) The Trade Agreements Act (19 U.S.C. 2501, *et seq.*) provides the authority for the President to waive the Buy American Act and other discriminatory provisions for eligible products from countries that have signed an international trade agreement with the United States, or that meet certain other criteria, such as being a least developed country. The President has delegated this waiver authority to the

U.S. Trade Representative. In acquisitions covered by the WTO GPA, Free Trade Agreements, or the Israeli Trade Act, the USTR has waived the Buy American Act and other discriminatory provisions for eligible products. Offers of eligible products receive equal consideration with domestic offers.

(2) The contracting officer shall determine the origin of services by the country in which the firm providing the services is established. See Subpart 25.5 for evaluation procedures for supply contracts covered by trade agreements.

(b) The value of the acquisition is a determining factor in the applicability

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of trade agreements. Most of these dollar thresholds are subject to revision by the U.S. Trade Representative ap-

proximately every 2 years. The various thresholds are summarized as follows:

Trade Agreement	Supply Contract (equal to or exceeding)	Service Contract (equal to or exceeding)	Construction Contract (equal to or exceeding)
WTO GPA	\$194,000	\$194,000	\$7,443,000
FTAs			
Australia FTA	67,826	67,826	7,443,000
Bahrain FTA	194,000	194,000	8,817,449
CAFTA-DR (Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, and Nicaragua)	67,826	67,826	7,443,000
Chile FTA	67,826	67,826	7,443,000
Morocco FTA	194,000	194,000	7,443,000
NAFTA			
-Canada	25,000	67,826	8,817,449
-Mexico	67,826	67,826	8,817,449
Oman FTA	194,000	194,000	8,817,449
Peru FTA	194,000	194,000	7,443,000
Singapore FTA	67,826	67,826	7,443,000
Israeli Trade Act	50,000	—	—

[69 FR 77874, Dec. 28, 2004, as amended at 71 FR 219, Jan. 3, 2006; 71 FR 865, Jan. 5, 2006; 71 FR 20307, Apr. 19, 2006; 71 FR 36937, June 28, 2006; 71 FR 67777, Nov. 22, 2006; 72 FR 46358, Aug. 17, 2007; 73 FR 10963, Feb. 28, 2008; 73 FR 16747, Mar. 28, 2008; 74 FR 28428, June 15, 2009]

25.403 World Trade Organization Government Procurement Agreement and Free Trade Agreements.

(a) Eligible products from WTO GPA and FTA countries are entitled to the nondiscriminatory treatment specified in 25.402(a)(1). The WTO GPA and FTAs specify procurement procedures designed to ensure fairness (see 25.408).

(b) *Thresholds.* (1) To determine whether the acquisition of products by lease, rental, or lease-purchase contract (including lease-to-ownership, or lease-with-option-to purchase) is covered by the WTO GPA or an FTA, calculate the estimated acquisition value as follows:

(i) If a fixed-term contract of 12 months or less is contemplated, use the total estimated value of the acquisition.

(ii) If a fixed-term contract of more than 12 months is contemplated, use the total estimated value of the acquisition plus the estimated residual value of the leased equipment at the conclusion of the contemplated term of the contract.

(iii) If an indefinite-term contract is contemplated, use the estimated

monthly payment multiplied by the total number of months that ordering would be possible under the proposed contract, *i.e.*, the initial ordering period plus any optional ordering periods.

(iv) If there is any doubt as to the contemplated term of the contract, use the estimated monthly payment multiplied by 48.

(2) The estimated value includes the value of all options.

(3) If, in any 12-month period, recurring or multiple awards for the same type of product or products are anticipated, use the total estimated value of these projected awards to determine whether the WTO GPA or an FTA applies. Do not divide any acquisition with the intent of reducing the estimated value of the acquisition below the dollar threshold of the WTO GPA or an FTA.

(c) *Purchase restriction.* (1) Under the Trade Agreements Act (19 U.S.C. 2512), in acquisitions covered by the WTO GPA, acquire only U.S.-made or designated country end products or U.S. or designated country services, unless offers for such end products or services are either not received or are insufficient to fulfill the requirements. This purchase restriction does not apply

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below the WTO GPA threshold for supplies and services, even if the acquisition is covered by an FTA.

[64 FR 72419, Dec. 27, 1999, as amended at 65 FR 36026, June 6, 2000; 67 FR 21535, Apr. 30, 2002; 67 FR 56123, Aug. 30, 2002; 69 FR 1054, Jan. 7, 2004; 69 FR 77875, Dec. 28, 2004]

25.404 Least developed countries.

For acquisitions covered by the WTO GPA, least developed country end products, construction material, and services must be treated as eligible products.

[69 FR 77875, Dec. 28, 2004]

25.405 Caribbean Basin Trade Initiative.

Under the Caribbean Basin Trade Initiative, the United States Trade Representative has determined that, for acquisitions covered by the WTO GPA, Caribbean Basin country end products, construction material, and services must be treated as eligible products. In accordance with Section 201 (a)(3) of the Dominican Republic—Central America—United States Free Trade Implementation Act (Pub. L. 109-53), when the CAFTA-DR agreement enters into force with respect to a country, that country is no longer designated as a beneficiary country for purposes of the Caribbean Basin Economic Recovery Act, and is therefore no longer included in the definition of “Caribbean Basin country” for purposes of the Caribbean Basin Trade Initiative.

[65 FR 24322, Apr. 25, 2000, as amended at 67 FR 6118, Feb. 8, 2002; 69 FR 1055, Jan. 7, 2004; 69 FR 77875, Dec. 28, 2004; 71 FR 36937, June 28, 2006]

25.406 Israeli Trade Act.

Acquisitions of supplies by most agencies are covered by the Israeli Trade Act, if the estimated value of the acquisition is \$50,000 or more but does not exceed the WTO GPA threshold for supplies (see 25.402(b)). Agencies other than the Department of Defense, the Department of Energy, the Department of Transportation, the Bureau of Reclamation of the Department of the Interior, the Federal Housing Finance Board, and the Office of Thrift Supervision must evaluate offers of Israeli end products without regard to the re-

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strictions of the Buy American Act. The Israeli Trade Act does not prohibit the purchase of other foreign end products. In accordance with Section 201 (a)(3) of the Dominican Republic—Central America—United States Free Trade Implementation Act (Pub. L. 109-53), when the CAFTA-DR agreement enters into force with respect to a country, that country is no longer designated as a beneficiary country for purposes of the Caribbean Basin Economic Recovery Act, and is therefore no longer included in the definition of “Caribbean Basin country” for purposes of the Caribbean Basin Trade Initiative.

[64 FR 72419, Dec. 27, 1999, as amended at 67 FR 21535, Apr. 30, 2002; 69 FR 1055, Jan. 7, 2004; 69 FR 77875, Dec. 28, 2004; 71 FR 36937, June 28, 2006]

25.407 Agreement on Trade in Civil Aircraft.

Under the authority of Section 303 of the Trade Agreements Act, the U.S. Trade Representative has waived the Buy American Act for civil aircraft and related articles, that meet the substantial transformation test of the Trade Agreements Act, from countries that are parties to the Agreement on Trade in Civil Aircraft. Those countries are Austria, Belgium, Bulgaria, Canada, Denmark, Egypt, Finland, France, Germany, Greece, Ireland, Italy, Japan, Luxembourg, Macao, the Netherlands, Norway, Portugal, Romania, Spain, Sweden, Switzerland, and the United Kingdom.

25.408 Procedures.

(a) If the WTO GPA or an FTA applies (see 25.401), the contracting officer must—

(1) Comply with the requirements of 5.203, Publicizing and response time;

(2) Comply with the requirements of 5.207, Preparation and transmittal of synopses;

(3) Not include technical requirements in solicitations solely to preclude the acquisition of eligible products;

(4) Specify in solicitations that offerors must submit offers in the English language and in U.S. dollars (see 52.214-34, Submission of Offers in the English Language, and 52.214-35,

Submission of Offers in U.S. Currency, or paragraph (c)(5) of 52.215-1, Instruction to Offerors—Competitive Acquisitions); and

(5) Provide unsuccessful offerors from WTO GPA or FTA countries notice in accordance with 14.409-1 or 15.503.

(b) See Subpart 25.5 for evaluation procedures and examples.

[64 FR 72419, Dec. 27, 1999, as amended at 68 FR 56679, Oct. 1, 2003; 69 FR 1055, Jan. 7, 2004; 69 FR 77875, Dec. 28, 2004; 73 FR 10962, Feb. 28, 2008]

Subpart 25.5—Evaluating Foreign Offers—Supply Contracts

25.501 General.

The contracting officer—

(a) Must apply the evaluation procedures of this subpart to each line item of an offer unless either the offer or the solicitation specifies evaluation on a group basis (see 25.503);

(b) May rely on the offeror's certification of end product origin when evaluating a foreign offer;

(c) Must identify and reject offers of end products that are prohibited in accordance with Subpart 25.7; and

(d) Must not use the Buy American Act evaluation factors prescribed in this subpart to provide a preference for one foreign offer over another foreign offer.

[64 FR 72419, Dec. 27, 1999, as amended at 67 FR 21535, Apr. 30, 2002; 71 FR 20306, Apr. 19, 2006]

25.502 Application.

(a) Unless otherwise specified in agency regulations, perform the following steps in the order presented:

(1) Eliminate all offers or offerors that are unacceptable for reasons other than price; *e.g.*, nonresponsive, debarred or suspended, or a prohibited source (see Subpart 25.7).

(2) Rank the remaining offers by price.

(3) If the solicitation specifies award on the basis of factors in addition to cost or price, apply the evaluation factors as specified in this section and use the evaluated cost or price in determining the offer that represents the best value to the Government.

(b) For acquisitions covered by the WTO GPA (see Subpart 25.4)—

(1) Consider only offers of U.S.-made or designated country end products, unless no offers of such end products were received;

(2) If the agency gives the same consideration given eligible offers to offers of U.S.-made end products that are not domestic end products, award on the low offer. Otherwise, evaluate in accordance with agency procedures; and

(3) If there were no offers of U.S.-made or designated country end products, make a nonavailability determination (see 25.103(b)(2)) and award on the low offer (see 25.403(c)).

(c) For acquisitions not covered by the WTO GPA, but subject to the Buy American Act (an FTA or the Israeli Trade Act also may apply), the following applies:

(1) If the low offer is a domestic offer or an eligible offer under NAFTA or the Israeli Trade Act, award on that offer.

(2) If the low offer is a noneligible offer and there were no domestic offers (see 25.103(b)(3)), award on the low offer.

(3) If the low offer is a noneligible offer and there is an eligible offer that is lower than the lowest domestic offer, award on the low offer. The Buy American Act provides an evaluation preference only for domestic offers.

(4) Otherwise, apply the appropriate evaluation factor provided in 25.105 to the low offer.

(i) If the evaluated price of the low offer remains less than the lowest domestic offer, award on the low offer.

(ii) If the price of the lowest domestic offer is less than the evaluated price of the low offer, award on the lowest domestic offer.

(d) *Ties.* (1) If application of an evaluation factor results in a tie between a domestic offer and a foreign offer, award on the domestic offer.

(2) If no evaluation preference was applied (*i.e.*, offers afforded nondiscriminatory treatment under the Buy American Act), resolve ties between domestic and foreign offers by a witnessed drawing of lots by an impartial individual.

(3) Resolve ties between foreign offers from small business concerns

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(under the Buy American Act, a small business offering a manufactured article that does not meet the definition of “domestic end product” is a foreign offer) or foreign offers from a small business concern and a large business concern in accordance with 14.408–6(a).

[64 FR 72419, Dec. 27, 1999, as amended at 67 FR 21535, Apr. 30, 2002; 69 FR 1055, Jan. 7, 2004; 69 FR 77875, Dec. 28, 2004; 71 FR 20306, Apr. 19, 2006]

25.503 Group offers.

(a) If the solicitation or an offer specifies that award can be made only on a group of line items or on all line items contained in the solicitation or offer, reject the offer—

(1) If any part of the award would consist of prohibited end products (see Subpart 25.7); or

(2) If the acquisition is covered by the WTO GPA and any part of the offer consists of items restricted in accordance with 25.403(c).

(b) If an offer restricts award to a group of line items or to all line items contained in the offer, determine for each line item whether to apply an evaluation factor (see 25.504–4, Example 1).

(1) First, evaluate offers that do not specify an award restriction on a line item basis in accordance with 25.502, determining a tentative award pattern by selecting for each line item the offer with the lowest evaluated price.

(2) Evaluate an offer that specifies an award restriction against the offered prices of the tentative award pattern, applying the appropriate evaluation factor on a line item basis.

(3) Compute the total evaluated price for the tentative award pattern and the offer that specified an award restriction.

(4) Unless the total evaluated price of the offer that specified an award restriction is less than the total evaluated price of the tentative award pattern, award based on the tentative award pattern.

(c) If the solicitation specifies that award will be made only on a group of line items or all line items contained in the solicitation, determine the category of end products on the basis of each line item, but determine whether to apply an evaluation factor on the

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basis of the group of items (see 25.504–4, Example 2).

(1) If the proposed price of domestic end products exceeds 50 percent of the total proposed price of the group, evaluate the entire group as a domestic offer. Evaluate all other groups as foreign offers.

(2) For foreign offers, if the proposed price of domestic end products and eligible products exceeds 50 percent of the total proposed price of the group, evaluate the entire group as an eligible offer.

(3) Apply the evaluation factor to the entire group in accordance with 25.502.

[64 FR 72419, Dec. 27, 1999, as amended at 69 FR 77875, Dec. 28, 2004; 71 FR 20306, Apr. 19, 2006]

25.504 Evaluation Examples.

The following examples illustrate the application of the evaluation procedures in 25.502 and 25.503. The examples assume that the contracting officer has eliminated all offers that are unacceptable for reasons other than price or a trade agreement (see 25.502(a)(1)). The evaluation factor may change as provided in agency regulations.

[67 FR 21535, Apr. 30, 2002]

25.504–1 Buy American Act.

(a)(1) Example 1.

Offer A	\$12,000	Domestic end product, small business.
Offer B	11,700	Domestic end product, small business.
Offer C	10,000	U.S.-made end product (not domestic), small business.

(2) *Analysis:* This acquisition is for end products for use in the United States and is set aside for small business concerns. The Buy American Act applies. Since the acquisition value is less than \$25,000 and the acquisition is set aside, none of the trade agreements apply. Perform the steps in 25.502(a). Offer C is evaluated as a foreign end product because it is the product of a small business, but is not a domestic end product (see 25.502(c)(4)). Since Offer B is a domestic offer, apply the 12 percent factor to Offer C (see 25.105(b)(2)). The resulting evaluated price of \$11,200 remains lower than Offer B. The cost of Offer B is therefore

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unreasonable (see 25.105(c)). Award on Offer C at \$10,000 (see 25.502(c)(4)(i)).

(b)(1) *Example 2.*

Offer A	\$11,000	Domestic end product, small business
Offer B	\$10,700	Domestic end product, small business
Offer C	\$10,200	U.S.-made end product (not domestic), small business

(2) *Analysis:* This acquisition is for end products for use in the United States and is set aside for small business concerns. The Buy American Act applies. Perform the steps in 25.502(a). Offer C is evaluated as a foreign end product because it is the product of a small business but is not a domestic end product (see 25.502(c)(4)). After applying the 12 percent factor, the evaluated price of Offer C is \$11,424. Award on Offer B at \$10,700 (see 25.502(c)(4)(ii)).

[64 FR 72419, Dec. 27, 1999, as amended at 67 FR 21535, Apr. 30, 2002]

25.504-2 WTO GPA/Caribbean Basin Trade Initiative/FTAs.

Example 1.

Offer A	\$204,000	U.S.-made end product (not domestic).
Offer B	203,000	U.S.-made end product (domestic), small business.
Offer C	200,000	Eligible product.
Offer D	195,000	Noneligible product (not U.S.-made).

Analysis: Eliminate Offer D because the acquisition is covered by the WTO GPA and there is an offer of a U.S.-made or an eligible product (see 25.502(b)(1)). If the agency gives the same consideration given eligible offers to offers of U.S.-made end products that are not domestic offers, it is unnecessary to determine if U.S.-made end products are domestic (large or small business). No further analysis is necessary. Award on the low remaining offer, Offer C (see 25.502(b)(2)).

[69 FR 77875, Dec. 28, 2004]

25.504-3 FTA/Israeli Trade Act.

(a) Example 1.

Offer A	\$105,000	Domestic end product, small business.
Offer B	100,000	Eligible product.

Analysis: Since the low offer is an eligible offer, award on the low offer (see 25.502(c)(1)).

(b) Example 2.

Offer A	\$105,000	Eligible product.
Offer B	103,000	Noneligible product.

Analysis: Since the acquisition is not covered by the WTO GPA, the contracting officer can consider the non-eligible offer. Since no domestic offer was received, make a nonavailability determination and award on Offer B (see 25.502(c)(2)).

(c) Example 3.

Offer A	\$105,000	Domestic end product, large business.
Offer B	103,000	Eligible product.
Offer C	100,000	Noneligible product.

Analysis: Since the acquisition is not covered by the WTO GPA, the contracting officer can consider the non-eligible offer. Because the eligible offer (Offer B) is lower than the domestic offer (Offer A), no evaluation factor applies to the low offer (Offer C). Award on the low offer (see 25.502(c)(3)).

[69 FR 77875, Dec. 28, 2004]

25.504-4 Group award basis.

(a) Example 1.

Item	Offers		
	A	B	C
1	DO = \$55,000	EL = \$56,000	NEL = \$50,000
2	NEL = 13,000	EL = 10,000	EL = 13,000
3	NEL = 11,500	DO = 12,000	DO = 10,000
4	NEL = 24,000	EL = 28,000	NEL = 22,000

Item	Offers		
	A	B	C
5	DO = 18,000	NEL = 10,000	DO = 14,000
	121,500	116,000	109,000

Key: DO = Domestic end product; EL = Eligible product; NEL = Noneligible product.

Problem: Offeror C specifies all-or-none award. Assume all offerors are large businesses. The acquisition is not covered by the WTO GPA .

Analysis: (see 25.503)

STEP 1: Evaluate Offers A & B before considering Offer C and determine which offer has the lowest evaluated cost for each line item (the tentative award pattern):

Item 1: Low offer A is domestic; select A.

Item 2: Low offer B is eligible; do not apply factor; select B.

Item 3: Low offer A is noneligible and Offer B is a domestic offer. Apply a 6 percent factor to Offer A. The evaluated price of Offer A is higher than Offer B; select B.

Item 4: Low offer A is noneligible. Since neither offer is a domestic offer, no evaluation factor applies; select A.

Item 5: Low offer B is noneligible; apply a 6 percent factor to Offer B. Offer A is still higher than Offer B; select B.

STEP 2: Evaluate Offer C against the tentative award pattern for Offers A and B:

Item	Offers		
	Low offer	Tentative award pattern from A and B	C
1	A	DO=\$55,000	*NEL=\$53,000
2	B	EL=10,000	EL=13,000
3	B	DO=12,000	DO=10,000
4	A	NEL=24,000	NEL=22,000
5	B	*NEL=10,600	DO=14,000
		111,600	112,000

* Offer + 6 percent.

On a line item basis, apply a factor to any noneligible offer if the other offer for that line item is domestic.

For Item 1, apply a factor to Offer C because Offer A is domestic and the acquisition was not covered by the WTO GPA . The evaluated price of Offer C, Item 1, becomes \$53,000 (\$50,000 plus 6 percent). Apply a factor to Offer B, Item 5, because it is a noneligible product and Offer C is domestic. The evaluated price of Offer B is \$10,600 (\$10,000 plus 6

percent). Evaluate the remaining items without applying a factor.

STEP 3: The tentative unrestricted award pattern from Offers A and B is lower than the evaluated price of Offer C. Award the combination of Offers A and B. Note that if Offer C had not specified all-or-none award, award would be made on Offer C for line items 1, 3, and 4, totaling an award of \$82,000.

(b) Example 2.

Item	Offers		
	A	B	C
1	DO=\$50,000	EL=\$50,500	NEL=\$50,000
2	NEL=10,300	NEL=10,000	EL=10,200
3	EL=20,400	EL=21,000	NEL=20,200
4	DO=10,500	DO=10,300	DO=10,400
	91,200	91,800	90,800

Problem: The solicitation specifies award on a group basis. Assume the Buy American Act applies and the acquisition cannot be set aside for small business concerns. All offerors are large businesses.

Analysis: (see 25.503(c))

STEP 1: Determine which of the offers are domestic (see 25.503(c)(1)):

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	Domestic [percent]	Determination
A	60,500/91,200=66.3%	Domestic
B	10,300/91,800=11.2%	Foreign
C	10,400/90,800=11.5%	Foreign

STEP 2: Determine whether foreign offers are eligible or noneligible offers (see 25.503(c)(2)):

	Domestic + eligible [percent]	Determination
A	N/A	Domestic
B	81,800/91,800=89.1%	Eligible
C	20,600/90,800=22.7%	Noneligible

STEP 3: Determine whether to apply an evaluation factor (see 25.503(c)(3)). The low offer (Offer C) is a foreign offer. There is no eligible offer lower than the domestic offer. Therefore, apply the factor to the low offer. Addition of the 6 percent factor (use 12 percent if Offer A is a small business) to Offer C yields an evaluated price of \$96,248 (\$90,800 + 6 percent). Award on Offer A (see 25.502(c)(4)(ii)). Note that, if Offer A were greater than Offer B, an evaluation factor would not be applied and award would be on Offer C (see 25.502(c)(3)).

[64 FR 72419, Dec. 27, 1999; 65 FR 4633, Jan. 31, 2000; 69 FR 77875, Dec. 28, 2004]

Subpart 25.6—American Recovery and Reinvestment Act—Buy American Act—Construction Materials

SOURCE: 74 FR 14626, Mar. 31, 2009, unless otherwise noted.

25.600 Scope of subpart.

This subpart implements section 1605 in Division A of the American Recovery and Reinvestment Act of 2009 (Pub. L. 111-5) (Recovery Act) and the Buy American Act. It applies to construction projects that use funds appropriated or otherwise provided by the Recovery Act.

25.601 Definitions.

As used in this subpart—

Domestic construction material means—

- (1) An unmanufactured construction material mined or produced in the United States; or
- (2) A construction material manufactured in the United States.

Foreign construction material means a construction material other than a domestic construction material.

Manufactured construction material means any construction material that is not unmanufactured construction material.

Recovery Act designated country means a World Trade Organization Government Procurement Agreement country, a Free Trade Agreement country, or a least developed country.

Steel means an alloy that includes at least 50 percent iron, between .02 and 2 percent carbon, and may include other elements.

Unmanufactured construction material means raw material brought to the construction site for incorporation into the building or work that has not been—

- (1) Processed into a specific form and shape; or
- (2) Combined with other raw material to create a material that has different properties than the properties of the individual raw materials.

25.602 Policy.

Except as provided in 25.603—

(a) None of the funds appropriated or otherwise made available by the Recovery Act may be used for a project for the construction, alteration, maintenance, or repair of a public building or public work (as defined at 22.401) unless—

- (1) The public building or public work is located in the United States; and
- (2) All of the iron, steel, and other manufactured goods used as construction material in the project are produced or manufactured in the United States.

(i) Production in the United States of the iron or steel used as construction material requires that all manufacturing processes must take place in the United States, except metallurgical processes involving refinement of steel additives. These requirements do not apply to steel or iron used as components or subcomponents of other manufactured construction material.

(ii) There is no requirement with regard to the origin of components or subcomponents in other manufactured construction material, as long as the

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manufacture of the construction material occurs in the United States.

(b) Use only domestic unmanufactured construction material, as required by the Buy American Act.

25.603 Exceptions.

(a) When one of the following exceptions applies, the contracting officer may allow the contractor to incorporate foreign construction materials without regard to the restrictions of section 1605 of the Recovery Act or the Buy American Act:

(1) *Nonavailability.* The head of the contracting activity may determine that a particular construction material is not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities of a satisfactory quality. The determinations of nonavailability of the articles listed at 25.104(a) and the procedures at 25.103(b)(1) also apply if any of those articles are acquired as construction materials.

(2) *Unreasonable cost.* The contracting officer concludes that the cost of domestic construction material is unreasonable in accordance with 25.605.

(3) *Inconsistent with public interest.* The head of the agency may determine that application of the restrictions of section 1605 of the Recovery Act or the Buy American Act to a particular construction material would be inconsistent with the public interest.

(b) *Determinations.* When a determination is made, for any of the reasons stated in this section, that certain foreign construction materials may be used—

(1) The contracting officer shall list the excepted materials in the contract; and

(2) The head of the agency shall publish a notice in the FEDERAL REGISTER within two weeks after the determination is made, unless the construction material has already been determined in the FAR to be domestically nonavailable (see list at 25.104). The notice shall include—

(i) The title “Buy American Exception under the American Recovery and Reinvestment Act of 2009”; and

(ii) The dollar value and brief description of the project; and

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(iii) A detailed justification as to why the restriction is being waived.

(c) *Acquisitions under trade agreements.*

(1) For construction contracts with an estimated acquisition value of \$7,443,000 or more, *also see* Subpart 25.4. Offers of products determined to be eligible products per Subpart 25.4 shall receive equal consideration with domestic offers per Subpart 25.4.

(2) For purposes of the Recovery Act, designated countries do not include the Caribbean Basin Countries.

25.604 Preaward determination concerning the inapplicability of section 1605 of the Recovery Act or the Buy American Act.

(a) For any acquisition, an offeror may request from the contracting officer a determination concerning the inapplicability of section 1605 of the Recovery Act or the Buy American Act for specifically identified construction materials. The time for submitting the request is specified in the solicitation in paragraph (b) of either 52.225–22 or 52.225–24, whichever applies. The information and supporting data that must be included in the request are also specified in the solicitation in paragraphs (c) and (d) of either 52.225–21 or 52.225–23, whichever applies.

(b) Before award, the contracting officer must evaluate all requests based on the information provided and may supplement this information with other readily available information.

(c) Determination based on unreasonable cost of domestic construction material.

(1) *Iron, steel, and other manufactured construction material.* The contracting officer must compare the offered price of the contract using foreign manufactured construction material to the estimated price if all domestic manufactured construction material were used. If use of domestic manufactured construction material would increase the overall offered price of the contract by more than 25 percent, then the contracting officer shall determine that the cost of the domestic manufactured construction material is unreasonable.

(2) *Unmanufactured construction material.* The contracting officer must compare the cost of each foreign unmanufactured construction material to the

cost of domestic unmanufactured construction material. If the cost of the domestic unmanufactured construction material exceeds the cost of the foreign unmanufactured construction material by more than 6 percent, then the contracting officer shall determine that the cost of the unmanufactured construction material is unreasonable.

25.605 Evaluating offers of foreign construction material.

(a) If the contracting officer has determined that an exception applies because the cost of certain domestic construction material is unreasonable, in accordance with section 25.604, then the contracting officer shall apply evaluation factors to the offer incorporating the use of such foreign construction material as follows:

(1) Use an evaluation factor of 25 percent, applied to the total offered price of the contract, if foreign iron, steel, or other manufactured goods are incorporated in the offer as construction material based on an exception for unreasonable cost requested by the offeror.

(2) In addition, use an evaluation factor of 6 percent applied to the cost of foreign unmanufactured construction material incorporated in the offer based on an exception for unreasonable cost requested by the offeror.

(3) Total evaluated price = offered price + (.25 × offered price, if (a)(1) applies) + (.06 × cost of foreign unmanufactured construction material, if (a)(2) applies).

(b) If two or more offers are equal in price, the contracting officer must give preference to an offer that does not include foreign construction material excepted at the request of the offeror on the basis of unreasonable cost.

(c) Offerors also may submit alternate offers based on use of equivalent domestic construction material to avoid possible rejection of the entire offer if the Government determines that an exception permitting use of a particular foreign construction material does not apply.

(d) If the contracting officer awards a contract to an offeror that proposed foreign construction material not listed in the applicable clause in the solicitation (paragraph (b)(3) of 52.225-21, or

paragraph (b)(3) of 52.225-23), the contracting officer must add the excepted materials to the list in the contract clause.

25.606 Postaward determinations.

(a) If a contractor requests a determination regarding the inapplicability of section 1605 of the Recovery Act or the Buy American Act after contract award, the contractor must explain why it could not request the determination before contract award or why the need for such determination otherwise was not reasonably foreseeable. If the contracting officer concludes that the contractor should have made the request before contract award, the contracting officer may deny the request.

(b) The contracting officer must base evaluation of any request for a determination regarding the inapplicability of section 1605 of the Recovery Act or the Buy American Act made after contract award on information required by paragraphs (c) and (d) of the applicable clause at 52.225-21 or 52.225-23 and/or other readily available information.

(c) If a determination, under 25.603(a), is made after contract award that an exception to section 1605 of the Recovery Act or to the Buy American Act applies, the contracting officer must negotiate adequate consideration and modify the contract to allow use of the foreign construction material. When the basis for the exception is the unreasonable cost of a domestic construction material, adequate consideration is at least the differential established in 25.605(a).

25.607 Noncompliance.

The contracting officer must—

(a) Review allegations of violations of section 1605 of the Recovery Act or Buy American Act;

(b) Unless fraud is suspected, notify the contractor of the apparent unauthorized use of foreign construction material and request a reply, to include proposed corrective action; and

(c) If the review reveals that a contractor or subcontractor has used foreign construction material without authorization, take appropriate action, including one or more of the following:

(1) Process a determination concerning the inapplicability of section

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1605 of the Recovery Act or the Buy American Act in accordance with 25.606.

(2) Consider requiring the removal and replacement of the unauthorized foreign construction material.

(3) If removal and replacement of foreign construction material incorporated in a building or work would be impracticable, cause undue delay, or otherwise be detrimental to the interests of the Government, the contracting officer may determine in writing that the foreign construction material need not be removed and replaced. A determination to retain foreign construction material does not constitute a determination that an exception to section 1605 of the Recovery Act or the Buy American Act applies, and this should be stated in the determination. Further, a determination to retain foreign construction material does not affect the Government's right to suspend or debar a contractor, subcontractor, or supplier for violation of section 1605 of the Recovery Act or the Buy American Act, or to exercise other contractual rights and remedies, such as reducing the contract price or terminating the contract for default.

(4) If the noncompliance is sufficiently serious, consider exercising appropriate contractual remedies, such as terminating the contract for default. Also consider preparing and forwarding a report to the agency suspension or debarment official in accordance with Subpart 9.4. If the noncompliance appears to be fraudulent, refer the matter to other appropriate agency officials, such as the officer responsible for criminal investigation.

Subpart 25.7—Prohibited Sources

SOURCE: 73 FR 33638, June 12, 2008, unless otherwise noted.

25.700 Scope of subpart.

This subpart implements—

(a) Economic sanctions administered by the Office of Foreign Assets Control (OFAC) in the Department of the Treasury prohibiting transactions involving certain countries, entities, and individuals; and

(b) The Sudan Accountability and Divestment Act of 2007 (Pub. L. 110-174).

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25.701 Restrictions on acquisitions of supplies or services from prohibited sources.

(a) Except as authorized by OFAC, agencies and their contractors and subcontractors must not acquire any supplies or services if any proclamation, Executive order, or statute administered by OFAC, or if OFAC's implementing regulations at 31 CFR Chapter V, would prohibit such a transaction by a person subject to the jurisdiction of the United States.

(b) Except as authorized by OFAC, most transactions involving Cuba, Iran, and Sudan are prohibited, as are most imports from Burma or North Korea into the United States or its outlying areas. In addition, lists of entities and individuals subject to economic sanctions are included in OFAC's List of Specially Designated Nationals and Blocked Persons at <http://www.treas.gov/offices/enforcement/ofac/sdn>. More information about these restrictions, as well as updates, is available in OFAC's regulations at 31 CFR Chapter V and/or on OFAC's website at <http://www.treas.gov/offices/enforcement/ofac>.

(c) Refer questions concerning the restrictions in paragraphs (a) or (b) of this section to the Department of the Treasury, Office of Foreign Assets Control, Washington, DC 20220, (Telephone (202) 622-2490).

25.702 Prohibition on contracting with entities that conduct restricted business operations in Sudan.

25.702-1 Definitions.

As used in this section—

Appropriate Congressional committees means—

(1) The Committee on Banking, Housing, and Urban Affairs, The Committee on Foreign Relations, and the Select Committee on Intelligence of the Senate; and

(2) The Committee on Financial Services, the Committee on Foreign Relations, and the Permanent Select Committee on Intelligence of the House of Representatives.

Business operations means engaging in commerce in any form, including by acquiring, developing, maintaining, owning, selling, possessing, leasing, or

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operating equipment, facilities, personnel, products, services, personal property, real property, or any other apparatus of business or commerce.

Marginalized populations of Sudan means—

(1) Adversely affected groups in regions authorized to receive assistance under section 8(c) of the Darfur Peace and Accountability Act (Pub. L. 109-344) (50 U.S.C. 1701 note); and

(2) Marginalized areas in Northern Sudan described in section 4(9) of such Act.

Restricted business operations—

(1) Means, except as provided in paragraph (2) of this definition, business operations in Sudan that include power production activities, mineral extraction activities, oil-related activities, or the production of military equipment, as those terms are defined in the Sudan Accountability and Divestment Act of 2007 (Pub. L. 110-174).

(2) Does not include business operations that the person (as that term is defined in Section 2 of the Sudan Accountability and Divestment Act of 2007) conducting the business can demonstrate—

(i) Are conducted under contract directly and exclusively with the regional government of southern Sudan;

(ii) Are conducted pursuant to specific authorization from the Office of Foreign Assets Control in the Department of the Treasury, or are expressly exempted under Federal law from the requirement to be conducted under such authorization;

(iii) Consist of providing goods or services to marginalized populations of Sudan;

(iv) Consist of providing goods or services to an internationally recognized peacekeeping force or humanitarian organization;

(v) Consist of providing goods or services that are used only to promote health or education; or

(vi) Have been voluntarily suspended.

[64 FR 72419, Dec. 27, 1999, as amended at 74 FR 40465, Aug. 11, 2009]

25.702-2 Certification.

As required by the Sudan Accountability and Divestment Act of 2007 (Pub. L. 110-174), each offeror must cer-

tify that it does not conduct restricted business operations in Sudan.

25.702-3 Remedies.

Upon the determination of a false certification under subsection 25.702-2—

(a) The contracting officer may terminate the contract;

(b) The suspending official may suspend the contractor in accordance with the procedures in Subpart 9.4; and

(c) The debarring official may debar the contractor for a period not to exceed 3 years in accordance with the procedures in Subpart 9.4.

25.702-4 Waiver.

(a) The President may waive the requirement of subsection 25.702-2 on a case-by-case basis if the President determines and certifies in writing to the appropriate congressional committees that it is in the national interest to do so.

(b) An agency seeking waiver of the requirement shall submit the request through the Administrator of the Office of Federal Procurement Policy.

Subpart 25.8—Other International Agreements and Coordination

25.801 General.

Treaties and agreements between the United States and foreign governments affect the evaluation of offers from foreign entities and the performance of contracts in foreign countries.

25.802 Procedures.

(a) When placing contracts with contractors located outside the United States, for performance outside the United States, contracting officers must—

(1) Determine the existence and applicability of any international agreements and ensure compliance with these agreements; and

(2) Conduct the necessary advance acquisition planning and coordination between the appropriate U.S. executive agencies and foreign interests as required by these agreements.

(b) The Department of State publishes many international agreements in the “United States Treaties and

Other International Agreements” series. Copies of this publication normally are available in overseas legal offices and U.S. diplomatic missions.

(c) Contracting officers must award all contracts with Taiwanese firms or organizations through the American Institute of Taiwan (AIT). AIT is under contract to the Department of State.

Subpart 25.9—Customs and Duties

25.900 Scope of subpart.

This subpart provides policies and procedures for exempting from import duties certain supplies purchased under Government contracts.

25.901 Policy.

United States laws impose duties on foreign supplies imported into the customs territory of the United States. Certain exemptions from these duties are available to Government agencies. Agencies must use these exemptions when the anticipated savings to appropriated funds will outweigh the administrative costs associated with processing required documentation.

25.902 Procedures.

For regulations governing importations and duties, see the Customs Regulations issued by the U.S. Customs Service, Department of the Treasury (19 CFR Chapter 1). Except as provided elsewhere in the Customs Regulations (see 19 CFR 10.100), all shipments of imported supplies purchased under Government contracts are subject to the usual Customs entry and examination requirements. Unless the agency obtains an exemption (see 25.903), those shipments are also subject to duty.

25.903 Exempted supplies.

(a) Subchapters VIII and X of Chapter 98 of the Harmonized Tariff Schedule of the United States (19 U.S.C. 1202) list supplies for which exemptions from duty may be obtained when imported into the customs territory of the United States under a Government contract. For certain of these supplies, the contracting agency must certify to the Commissioner of Customs that they are for the purpose stated in the Harmonized Tariff Schedule (see 19 CFR 10.102–104, 10.114, and 10.121 and 15

CFR part 301 for requirements and formats).

(b) Supplies (excluding equipment) for Government-operated vessels or aircraft may be withdrawn from any customs-bonded warehouse, from continuous customs custody elsewhere than in a bonded warehouse, or from a foreign-trade zone, free of duty and internal revenue tax as provided in 19 U.S.C. 1309 and 1317. The contracting activity must cite this authority on the appropriate customs form when making purchases (see 19 CFR 10.59–10.65).

Subpart 25.10—Additional Foreign Acquisition Regulations

25.1001 Waiver of right to examination of records.

(a) *Policy.* The clause at 52.215–2, Audit and Records—Negotiation, prescribed at 15.209(b), and paragraph (d) of the clause at 52.212–5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items, prescribed at 12.301(b)(4), implement 10 U.S.C. 2313 and 41 U.S.C. 254d. The basic clauses authorize examination of records by the Comptroller General.

(1) Insert the appropriate basic clause, whenever possible, in negotiated contracts with foreign contractors.

(2) The contracting officer may use 52.215–2 with its *Alternate III* or 52.212–5 with its *Alternate I* after—

(i) Exhausting all reasonable efforts to include the basic clause;

(ii) Considering factors such as alternate sources of supply, additional cost, and time of delivery; and

(iii) The head of the agency has executed a determination and findings in accordance with paragraph (b) of this section, with the concurrence of the Comptroller General. However, concurrence of the Comptroller General is not required if the contractor is a foreign government or agency thereof or is precluded by the laws of the country involved from making its records available for examination.

(b) *Determination and findings.* The determination and findings must—

(1) Identify the contract and its purpose, and identify if the contract is

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with a foreign contractor or with a foreign government or an agency of a foreign government;

(2) Describe the efforts to include the basic clause;

(3) State the reasons for the contractor's refusal to include the basic clause;

(4) Describe the price and availability of the supplies or services from the United States and other sources; and

(5) Determine that it will best serve the interest of the United States to use the appropriate alternate clause in paragraph (a)(2) of this section.

25.1002 Use of foreign currency.

(a) Unless an international agreement or the WTO GPA (see 25.408(a)(4)) requires a specific currency, contracting officers must determine whether solicitations for contracts to be entered into and performed outside the United States will require submission of offers in U.S. currency or a specified foreign currency. In unusual circumstances, the contracting officer may permit submission of offers in other than a specified currency.

(b) To ensure a fair evaluation of offers, solicitations generally should require all offers to be priced in the same currency. However, if the solicitation permits submission of offers in other than a specified currency, the contracting officer must convert the offered prices to U.S. currency for evaluation purposes. The contracting officer must use the current market exchange rate from a commonly used source in effect as follows:

(1) For acquisitions conducted using sealed bidding procedures, on the date of bid opening.

(2) For acquisitions conducted using negotiation procedures—

(i) On the date specified for receipt of offers, if award is based on initial offers; otherwise

(ii) On the date specified for receipt of final proposal revisions.

(c) If a contract is priced in foreign currency, the agency must ensure that adequate funds are available to cover currency fluctuations to avoid a viola-

tion of the Anti-Deficiency Act (31 U.S.C. 1341, 1342, 1511–1519).

[64 FR 72419, Dec. 27, 1999, as amended at 69 FR 1055, Jan. 7, 2004; 69 FR 77876, Dec. 28, 2004]

Subpart 25.11—Solicitation Provisions and Contract Clauses

25.1101 Acquisition of supplies.

The following provisions and clauses apply to the acquisition of supplies and the acquisition of services involving the furnishing of supplies.

(a)(1) Insert the clause at 52.225–1, Buy American Act—Supplies, in solicitations and contracts with a value exceeding the micro-purchase threshold but not exceeding \$25,000; and in solicitations and contracts with a value exceeding \$25,000, if none of the clauses prescribed in paragraphs (b) and (c) of this section apply, except if—

(i) The solicitation is restricted to domestic end products in accordance with Subpart 6.3;

(ii) The acquisition is for supplies for use within the United States and an exception to the Buy American Act applies (*e.g.*, nonavailability, public interest, or information technology that is a commercial item); or

(iii) The acquisition is for supplies for use outside the United States.

(2) Insert the provision at 52.225–2, Buy American Act Certificate, in solicitations containing the clause at 52.225–1.

(b)(1)(i) Insert the clause at 52.225–3, Buy American Act—Free Trade Agreements—Israeli Trade Act, in solicitations and contracts if—

(A) The acquisition is for supplies, or for services involving the furnishing of supplies, for use within the United States, and the acquisition value is \$25,000 or more, but is less than \$194,000;

(B) The acquisition is not for information technology that is a commercial item, using fiscal year 2004 or subsequent fiscal year funds; and

(C) No exception in 25.401 applies. For acquisitions of agencies not subject to the Israeli Trade Act (see 25.406), see agency regulations.

(ii) If the acquisition value is \$25,000 or more but is less than \$50,000, use the clause with its *Alternate I*.

(iii) If the acquisition value is \$50,000 or more but is less than \$67,826, use the clause with its *Alternate II*.

(2)(i) Insert the provision at 52.225–4, Buy American Act—Free Trade Agreements—Israeli Trade Act Certificate, in solicitations containing the clause at 52.225–3.

(ii) If the acquisition value is \$25,000 or more but is less than \$50,000, use the provision with its *Alternate I*.

(iii) If the acquisition value is \$50,000 or more but is less than \$67,826, use the provision with its *Alternate II*.

(c)(1) Insert the clause at 52.225–5, Trade Agreements, in solicitations and contracts valued at \$194,000 or more, if the acquisition is covered by the WTO GPA applies (see Subpart 25.4) and the agency has determined that the restrictions of the Buy American Act are not applicable to U.S.-made end products. If the agency has not made such a determination, the contracting officer must follow agency procedures.

(2) Insert the provision at 52.225–6, Trade Agreements Certificate, in solicitations containing the clause at 52.225–5.

(d) Insert the provision at 52.225–7, Waiver of Buy American Act for Civil Aircraft and Related Articles, in solicitations for civil aircraft and related articles (see 25.407), if the acquisition value is less than \$194,000.

(e) Insert the clause at 52.225–8, Duty-Free Entry, in solicitations and contracts for supplies that may be imported into the United States and for which duty-free entry may be obtained in accordance with 25.903(a), if the value of the acquisition—

(1) Exceeds the simplified acquisition threshold; or

(2) Does not exceed the simplified acquisition threshold, but the savings from waiving the duty is anticipated to be more than the administrative cost of waiving the duty. When used for acquisitions that do not exceed the simplified acquisition threshold, the contracting officer may modify paragraphs (c)(1) and (j)(2) of the clause to reduce the dollar figure.

(f) Insert the provision at 52.225–18, Place of Manufacture, in solicitations that are predominantly for the acquisition of manufactured end products, as defined in the provision at 52.225–18

(i.e., the estimated value of the manufactured end products exceeds the estimated value of other items to be acquired as a result of the solicitation).

[64 FR 72419, Dec. 27, 1999, as amended at 65 FR 36026, June 6, 2000; 67 FR 21535, Apr. 30, 2002; 67 FR 56122, Aug. 30, 2002; 67 FR 56124, Aug. 30, 2002; 68 FR 4051, Jan. 27, 2003; 69 FR 1055, Jan. 7, 2004; 69 FR 8315, Feb. 23, 2004; 69 FR 77876, Dec. 28, 2004; 71 FR 224, 228, Jan. 3, 2006; 71 FR 866, Jan. 5, 2006; 71 FR 57368, 57378, Sept. 28, 2006; 73 FR 10963, Feb. 28, 2008]

25.1102 Acquisition of construction.

When using funds other than those appropriated under the American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5) (Recovery Act), follow the prescriptions in paragraphs (a) through (d) of this section. Otherwise, follow the prescription in paragraph (e).

(a) Insert the clause at 52.225–9, Buy American Act—Construction Materials, in solicitations and contracts for construction that is performed in the United States valued at less than \$7,443,000.

(1) List in paragraph (b)(2) of the clause all foreign construction material excepted from the requirements of the Buy American Act.

(2) If the head of the agency determines that a higher percentage is appropriate, substitute the higher evaluation percentage in paragraph (b)(3)(i) of the clause.

(b)(1) Insert the provision at 52.225–10, Notice of Buy American Act Requirement—Construction Materials, in solicitations containing the clause at 52.225–9.

(2) If insufficient time is available to process a determination regarding the inapplicability of the Buy American Act before receipt of offers, use the provision with its *Alternate I*.

(c) Insert the clause at 52.225–11, Buy American Act—Construction Materials under Trade Agreements, in solicitations and contracts for construction that is performed in the United States valued at \$7,443,000 or more.

(1) List in paragraph (b)(3) of the clause all foreign construction material excepted from the requirements of the Buy American Act, other than designated country construction material.

(2) If the head of the agency determines that a higher percentage is appropriate, substitute the higher evaluation percentage in paragraph (b)(4)(i) of the clause.

(3) For acquisitions valued at \$7,443,000 or more, but less than \$8,817,449, use the clause with its *Alternate I*. List in paragraph (b)(3) of the clause all foreign construction material excepted from the requirements of the Buy American Act, unless the excepted foreign construction material is from a designated country other than Bahrain, Mexico, and Oman.

(d)(1) Insert the provision at 52.225-12, Notice of Buy American Act Requirement—Construction Materials under Trade Agreements, in solicitations containing the clause at 52.225-11.

(2) If insufficient time is available to process a determination regarding the inapplicability of the Buy American Act before receipt of offers, use the provision with its *Alternate I*.

(3) For acquisitions valued at \$7,443,000 or more, but less than \$8,817,449, use the clause with its *Alternate II*.

(e)(1) When using funds appropriated under the Recovery Act for construction, use provisions and clauses 52.225-21, 52.225-22, 52.225-23, or 52.225-24 (with appropriate Alternates) in lieu of the provisions and clauses 52.225-9, 52.225-10, 52.225-11, or 52.225-12 (with appropriate Alternates), respectively, that would be applicable as prescribed in paragraphs (a) through (d) of this section if Recovery Act funds were not used.

(2) When using clause 52.225-23, list foreign construction material in paragraph (b)(3) of the clause as follows:

(i) *Basic clause*. List all foreign construction materials excepted from the Buy American Act or section 1605 of the the Recovery Act, other than Recovery Act designated country construction material.

(ii) *Alternate I*. List in paragraph (b)(3) of the clause all foreign construction material excepted from the Buy American Act or section 1605 of the Recovery Act, unless the excepted foreign construction material is from a Recov-

ery Act designated country other than Bahrain, Mexico, or Oman.

[64 FR 72419, Dec. 27, 1999, as amended at 65 FR 36026, June 6, 2000; 67 FR 21536, Apr. 30, 2002; 67 FR 56124, Aug. 30, 2002; 69 FR 1055, Jan. 7, 2004; 69 FR 77876, Dec. 28, 2004; 71 FR 219, Jan. 3, 2006; 71 FR 866, Jan. 5, 2006; 71 FR 20308, Apr. 19, 2006; 73 FR 10963, Feb. 28, 2008; 74 FR 14628, Mar. 31, 2009; 74 FR 22810, May 14, 2009]

25.1103 Other provisions and clauses.

(a) *Restrictions on certain foreign purchases*. Insert the clause at 52.225-13, Restrictions on Certain Foreign Purchases, in solicitations and contracts, unless an exception applies.

(b) *Translations*. Insert the clause at 52.225-14, Inconsistency Between English Version and Translation of Contract, in solicitations and contracts if anticipating translation into another language.

(c) *Foreign currency offers*. Insert the provision at 52.225-17, Evaluation of Foreign Currency Offers, in solicitations that permit the use of other than a specified currency. Insert in the provision the source of the rate to be used in the evaluation of offers.

(d) The contracting officer shall include in each solicitation for the acquisition of products or services (other than commercial items procured under Part 12) the provision at 52.225-20, Prohibition on Conducting Restricted Business Operations in Sudan—Certification.

[64 FR 72419, Dec. 27, 1999, as amended at 65 FR 36026, 36028, June 6, 2000; 67 FR 21538, Apr. 30, 2002; 67 FR 56122, 56124, Aug. 30, 2002; 68 FR 4051, Jan. 27, 2003; 68 FR 56686, Oct. 1, 2003; 69 FR 1055, Jan. 7, 2004; 69 FR 8315, Feb. 23, 2004; 71 FR 866, Jan. 5, 2006; 71 FR 20306, Apr. 19, 2006; 71 FR 57368, Sept. 28, 2006; 73 FR 33639, June 12, 2008]

PART 26—OTHER SOCIOECONOMIC PROGRAMS

Subpart 26.1—Indian Incentive Program

Sec.

26.100 Scope of subpart.

26.101 Definitions.

26.102 Policy.

26.103 Procedures.

26.104 Contract clause.